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October 16, 2003

Federal Election Commission
Office of the General Counsel
999 E Street, NW
Washington, DC 20463

AOR 2003-34

Re: Advisory Opinion Request

Dear Commissioners:

On behalf of Viacom Inc. and its wholly owned subsidiary Showtime Networks Inc., we respectfully request an advisory opinion from the Federal Election Commission pursuant to 2 U.S.C. § 437f, regarding a documentary series to be funded and televised by Showtime Networks Inc.

In summary, Showtime Networks Inc. intends to fund the production of, market, televise and re-distribute rights to a simulated presidential campaign involving American citizens participating as themselves, rather than actors playing fictional roles, in documentary, or "reality" format, and wants to be sure that no aspect of such a campaign simulation will violate any provision of the Federal Election Campaign Act of 1971, as amended ("FECA").

THE REQUESTORS

Viacom Inc. ("Viacom") is a leading global media company, with preeminent positions in broadcast and cable television, radio, outdoor advertising, and online. With programming that appeals to audiences in every demographic category across virtually all media, the company is a leader in the creation, promotion, and distribution of entertainment, news, sports, music, and comedy. Viacom's well-known brands include CBS, MTV, Nickelodeon, VH1, BET, Paramount Pictures, Viacom Outdoor, Infinity, UPN, Spike TV, TV Land, CMT: Country Music Television, Comedy Central, Showtime, Blockbuster, and Simon & Schuster.¹

¹ For more information regarding Viacom's various media operations, see www.viacom.com/thefacts.tin.

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Showtime Networks Inc. ("Showtime") owns and operates the Showtime television network ("Showtime television network").² The Showtime television network is a well-established premium television network that features a variety of content including a number of socially conscious mini-series, specials, documentaries and docu-dramas each year. Examples of recent or upcoming documentaries and docu-dramas commenting upon cultural, historical or political topics funded, produced and/or exhibited by Showtime include:

Showtime Documentaries

Bulletproof: Reagan After Hinckley (2001) – A companion to Showtime's docu-drama *The Day Reagan Was Shot*, this documentary examines the aftermath of the 1981 assassination attempt that left President Reagan's presidency altered forever (produced by the New York Times Corp. for Showtime).

The Boys Of 2nd Street Park (2003) – This documentary features six men, now in their mid 50s, and traces their lives from childhood growing up around a basketball court in a New York City park, through the cultural changes of the 1960s and 1970s and the Vietnam War, and comparing their lives today.

Freshman Diaries (2003) – A "reality" documentary series which follows the day-to-day lives and maturing process of 17 college freshmen at the University of Texas with the students carrying their own cameras.

Searching For Debra Winger (2003) – This documentary features interviews with over 30 professional actresses addressing the topic of Hollywood careers and family demands, taking its title from Debra Winger's unusual choice to quit show business at the height of a very successful career to spend more time with her family.

² Showtime also owns cable television networks The Movie Channel and FLIX, as well as multiplex channels Showtime Too, Showtime Showcase, Showtime Extreme, Showtime Beyond, Showtime Next, Showtime Women, Showtime FamilyZone, and TMC Xtra. Showtime operates and manages the television network Sundance Channel, which is owned jointly by Showtime, Robert Redford and Universal Studios. Showtime markets and distributes sports and entertainment events for exhibition to subscribers on a pay-per-view basis through Showtime Pay Per View. More information about Showtime Networks Inc. is available at www.sho.com/about.

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Showtime Docu-Dramas

DC 9/11: Time Of Crisis (2003) – Based on actual events and in-depth interviews of government officials as well as independent research, this docu-drama traces the nine days following the September 11, 2001 terrorist attacks on the United States. With actual footage weaved into dramatic reenactments, the docu-drama recounts the actual tragic events from the moment President Bush learns of the attacks to significant national security briefings regarding the Al Qaeda network, as well as the President's addresses to the nation from Barksdale Air Force Base and the White House.

Jasper, Texas (2003) – The shocking true story of the brutal murder of an African-American man in Texas by three racist whites, an event that galvanized the nation.

Out of the Ashes (2003) – True account of a Hungarian gynecologist who survives WWII by running a concentration camp infirmary – a choice with serious political consequences after the war.

The Day Reagan Was Shot (2001) – A dramatic re-enactment illustrating the disorganization and political power struggles inside the White House on the day in 1981 when President Ronald Reagan was shot.

Strange Justice (1999) – This Peabody Award-winning presentation recounts the true story of the controversial October 1991 Senate confirmation hearings of Supreme Court nominee Clarence Thomas.

Thanks Of A Grateful Nation (1998) – A fact-based drama about the U.S. Government's denial and alleged cover-up of American troops' exposure to toxic agents during the Persian Gulf War.

Neither Viacom, Showtime or any of their corporate affiliates or subsidiaries are owned or controlled by any political party, political committee or candidate.

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THE AMERICAN CANDIDATE DOCUMENTARY SERIES

Showtime intends to finance the production of, market, exhibit and re-distribute through various media channels a "reality" documentary series entitled *American Candidate*. The series will be produced by documentary filmmaker R.J. Cutler. *American Candidate* will simulate a presidential campaign involving American citizens who compete in a series of real-world and staged events, all designed to test their mettle and political skill while being filmed over a three to four month period. The program will illustrate the decision-making processes and strains of political campaigns and serve as social commentary on the American political system as well as political leadership and character in America in an entertaining "reality" format. Showtime and the producers also intend that the show engage viewers in the democratic process by giving them "real people" to support and by providing them an interactive process by which they can participate in the contest.

Executive Producer

Showtime has contracted with R.J. Cutler's firm, TMD Productions, Inc. ("TMD"), to produce *American Candidate*. TMD will provide the services of Mr. Cutler as well as Jay Roach and Tom Lassally as Executive Producers. TMD also will provide all production services.

Mr. Cutler originally conceived the *American Candidate* concept. Mr. Cutler is a well-known and successful documentary filmmaker with award-winning credits such as *The War Room*, *A Perfect Candidate*, and *American High*, as well as the highly acclaimed *Freshman Diaries*. Mr. Cutler's idea for *American Candidate* was inspired in part by his experience in filming *A Perfect Candidate* about the 1994 Senate election campaign in Virginia and what he perceives as the American public's disenchantment with modern public leadership and disengagement from the democratic process.

Mr. Roach is a film director and producer whose work includes *Austin Powers* and *Meet the Parents*. Mr. Lassally is a film producer and executive who is a principal partner in Giant Robot Entertainment, a management/production company in Santa Monica, California. None of Mr. Cutler, Mr. Roach or Mr. Lassally is actively engaged in managing or consulting any federal candidate, campaign or political party, and none is an employee of any federal campaign or political party.

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Mr. Cutler will consult political experts, academics and consultants in creating the series. Among those who are likely to be consulted are the individuals who have agreed to serve on an Advisory Board for the program. Individuals who have agreed to serve on the Advisory Board are:

Henry Louis Gates, Jr., Ph.D. (Chair, Afro-American Studies Department, Harvard University)

Elaine Kamarck, Ph.D. (Lecturer, Kennedy School of Government)

Bob Kerrey (President, The New School; Former U.S. Senator and Governor, Nebraska)

Wendy Kopp (Founder and President, Teach for America)

Kay Maxwell (President, League of Women Voters)

Ron Nessen (Former Press Secretary to President Gerald R. Ford)

Norm Ornstein, Ph.D. (Resident Scholar, American Enterprise Institute)

Larry Sabato, Ph.D. (Professor of Government and Foreign Affairs, University of Virginia)

Alan Simpson (Former U.S. Senator, Wyoming)

Kathryn Tenpas, Ph.D. (Presidential Scholar, University of Pennsylvania)

Production Financing

All financial plans contemplated for the production, promotion, initial exhibition on the Showtime television network and re-distribution of *American Candidate* are standard in the television industry. Showtime will pay TMD and Mr. Cutler to produce *American Candidate* pursuant to a licensing agreement. TMD and Mr. Cutler will apply those funds to pay for production expenses. In addition to this funding, various corporations will provide products and services (in the form of product placements and other promotional opportunities) to offset production costs.

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Cable television operators and other distributors pay Showtime monthly license fees to carry the Showtime television network. Those fees are not tied to an individual program such as *American Candidate*. In addition, Showtime would be compensated for licensing exhibition rights in the program to other media organizations.

Content of the Documentary Series

Production and filming of *American Candidate* has not begun, although planning is underway, the show has been announced publicly, and production is scheduled to commence in February 2004. The show is slated to be exhibited on the Showtime television network beginning in the Summer of 2004.

As a "reality" format, there is no script and much of what occurs will be spontaneous and dependent upon future editorial decisions. Accordingly, the precise content of each episode cannot be presented at this time. What can be provided are the program's roadmap and concept and Showtime's expectations for program content.

As currently contemplated, *American Candidate* will be presented in weekly episodes. Over the course of the series the field of contestants gradually will be narrowed until there is one winner, the "American Candidate." Each weekly episode will feature another round of the campaign competition.

On each episode, contestants will be presented making speeches to citizens and appearing at authentic public events as well as participating in staged events such as intellectual competitions, debates, press conferences, crisis simulations and psychological tests. They also will be filmed behind the scenes devising campaign strategies, making television advertisements, consulting with advisors, deciding upon policy positions and building public support for their candidacies (on websites as well as public appearances) between the program's formal staged events. It is possible that contestants also will be filmed soliciting contributions to *bona fide* 501(c)(3) charitable organizations. All charitable donations solicited by contestants would have to be donated directly to the charities.

The show might feature a host as well as guest appearances by prominent public figures, current or former office holders, academics, professional political consultants or celebrities to provide commentary on the competition and

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contestants. Contestants might also be filmed consulting professional political consultants. It is not the intent of Showtime or the producers to advance or defeat any particular political party or candidacy in casting these commentators or political consultants.

It is possible that the show will include federal candidates on the campaign trail and appearances by federal candidates in the context of enhancing the political discussion, competition and reality of the contestants' simulated campaign. These appearances, as well as reactions by the contestants or other guest commentators, may include references to actual federal office holders or candidates, again in the context of engaging the contestants in a realistic simulation. It would be impossible to prohibit such discussion and extremely stifling to attempt to censor such references.

Editorial Discretion & Criteria

American Candidate is intended by Viacom, Showtime and the producers to comment upon the American political system by putting interesting contestants with serious ideas through an illuminating and entertaining simulated election process. Achievement of that objective will require Showtime and the producers to exercise significant editorial discretion over the content of the program, including conceptualizing the program, casting diverse contestants, consultants and experts, staging campaign events, choosing what to film, and editing thousands of hours of film to one-hour (plus or minus) weekly episodes to be presented to the public. There are many editorial and artistic criteria that experienced networks and producers employ to craft documentaries and it is difficult to catalog them all here. *American Candidate* editorial biases likely will favor diverse and engaging contestants, serious political and policy discussion, dramatic decision-making that makes a statement about leadership and democratic character, realistic settings, insightful political commentary, and intersections with the real political process.

Mr. Cutler and his fellow producers will make most editorial decisions in the first instance and Showtime has the right to edit each weekly episode when it is delivered.

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Casting Process

The program will solicit applications from the general public in all regions of the United States by advertising the program, earning media coverage for the program, launching an interactive AmericanCandidate.com website (already operative and accepting requests for applications, which will be mailed in the Winter of 2004), and reaching out to a broad range of civic associations.

It is anticipated that the producers will receive as many as 10,000 applications from potential contestants. Every effort will be made to ensure a demographically and philosophically diverse field. The producers hope to assemble a "Blue Ribbon Leadership Panel" consisting of approximately a dozen leaders from the fields of government, business, education, clergy, civic and activist organizations, military and media to evaluate each potential cast member's performance on several skills tests, including crisis management, behavior in social settings, giving press interviews, delivering speeches, and debating other participants. Subject to editorial input and direction from the producers and Showtime, individuals would then be selected to continue on the program as the cast of "final contestants." These competitions and the selection process will be filmed and become part of the program.

Once final contestants have been cast, they will begin their head-to-head competition in earnest. Each week they will plot campaign strategy under the watchful eye of a camera, campaign for support, respond to emails from viewers, and make public pronouncements intended to garner public support. They will receive candidate training, assistance and advice from professional political and media consultants. Their actions will be filmed and edited and then displayed in weekly episodes.

At the conclusion of each episode, viewers and the general public will have the opportunity to vote for their favorite contestant via telephone or the Internet. Over a period of about ten to twelve weeks, the field gradually will be reduced to one "American Candidate" according to each week's popular vote, polling samples, and the program's judges.

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Contestant Eligibility & Restrictions

As a condition of participating on the program, each potential contestant will be required to sign a "Stage One Application & Release" which prescribes certain eligibility criteria and waivers. Most notably, it expressly prohibits the person from being or becoming a candidate or from exploring a candidacy in any federal, state or local election. Specifically, each contestant will be required to agree to the following explicit prohibition:

I acknowledge and agree to the following restriction on my participation: Any applicant for, participant in, or contestant on the *American Candidate* series who is deemed by Showtime, the Producer, the Federal Election Commission, or the Federal Communications Commission at any time to be a candidate or to explore an actual candidacy for any public office will be automatically disqualified from participation in the *American Candidate* series and competition. I acknowledge and understand that I may be disqualified on the basis that I am a candidate or that I am becoming or exploring an actual candidacy for public office in the sole discretion of Showtime or the Producer, and that such a determination may be made by reference to, but need not be limited to, the following indicia of candidacy provided by federal law:

- (1) Seek a nomination for election, or election, to any public office;
- (2) Receive contributions or make expenditures for nomination or election to any public office;
- (3) Authorize or grant consent to any other person to receive contributions or make expenditures on my behalf for nomination or election to any public office;
- (4) Advertise or publicize an intent to campaign for any public office;
- (5) Make, authorize or consent to written or oral statements that refer to the applicant as an actual candidate for any public office;
- (6) Take action to qualify for the ballot in any State or locality; and/or

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- (7) Receive contributions or make expenditures for the purpose of determining whether to become a candidate for a public office.

This statement also will appear in the program's "Eligibility Requirements" each applicant will be required to read. The sources for these restrictions are 2 U.S.C. § 431(2) and 11 C.F.R. §§ 100.72 & 100.131. Any applicant or contestant who violates the terms of this prohibition by being a candidate or exploring a federal candidacy during the production or initial exhibition of the program will be ineligible for or disqualified and removed from the program.

Additionally, each contestant will be prohibited from receiving any financial contributions to his or her *American Candidate* campaign. All charitable donations solicited by contestants would have to be donated directly to the charities. *American Candidate* may provide contestants stipends and travel expenses to participate on the program, and each contestant will be limited equally in the amount of resources devoted to his or her campaign. Contestants will be prohibited from hiring their own private professional campaign consultants.

Production Schedule

Preliminary planning and a publicity strategy already are underway. Although the filming schedule and details of the program will necessarily change over the course of production, it is currently contemplated that the application and casting process will begin as early as January 2004. Filming will begin during the casting period with coverage of the early interview procedures and application process. By Spring of 2004, the selection process and filming will be in full gear and will continue until the series ends in Fall of 2004.

Television Airing

The goal is to have the field of final contestants cast by June 2004. The television series should begin airing in Summer of 2004 and is anticipated to run through Fall of 2004.

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AmericanCandidate.com Website

The AmericanCandidate.com and possibly other websites will operate in conjunction with the television series. Not all uses for such websites have been fully developed, though it is anticipated that websites will be used to promote the series, interact with viewers and fans, feature the contestants, track the series and provide updates, and educate the public about political campaigns. Each of the final contestants might be provided a personalized page on the AmericanCandidate.com website to advertise his or her campaign and interact directly with fans. It is likely that fans will be permitted to post their own reactions and opinions on the program's website. Showtime and the producers will reserve ultimate editorial rights over the website, although they do not intend to censor the public's speech.

Promotional & Distribution Rights

Showtime will have the exclusive rights to exhibit all episodes of the *American Candidate* series on "pay television" (or subscription television) in the United States and Canada in perpetuity. Showtime also will have the right to license and distribute the episodes for exhibition in all other media, including but not limited to broadcast, satellite and cable television, as well as home video and DVD, for ten years, until October 31, 2014. Accordingly, while Showtime intends to exhibit *American Candidate* on the Showtime television network starting in the Summer of 2004, in the future Showtime may choose to license re-runs of the series to other media outlets in the ordinary course of business.

Showtime also will own the exclusive right to "advertise, promote and publicize the Series in any and all media" and intends to do so aggressively.

LEGAL ANALYSIS

In addition to commenting upon the American political system and engaging the public in a serious discussion of issues and leadership character, *American Candidate* will have the effect of attracting public attention for one or more contestants. It would be difficult to predict at this pre-production stage precisely what kind of public attention a successful *American Candidate* contestant might garner through his or her participation in a simulated presidential campaign. Although the timing of the series would preclude a federal candidacy in the Fall of

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2004, it is at least possible that a contestant might become the object of speculation as a potential candidate in a real election at some future time.

• • •
Showtime and the producers intend for each contestant to face simulated challenges, deliver speeches on public policy, and to demonstrate their effectiveness in addressing these tasks. The documentary series will be more engaging if contestants perform these tasks skillfully in ways that impress viewers. That will increase viewership and public participation in the series, including voting in the contest. Some viewers might conclude that certain contestants have potential to serve in public office, and one or more contestants might decide to become a candidate for some office in the future, following his or her *American Candidate* experience.

Showtime and the producers have no ability to predict or control the actions or decisions of a former contestant after he or she departs the program. However, because Showtime and the producers will have provided each contestant a platform for obtaining public attention, as well as campaign tools such as consultants, campaign advertisements and candidate training, a former contestant might actually throw his or her hat into a future federal election. We seek to confirm that such a decision by a former contestant would not retroactively convert *American Candidate* production costs (or any costs expended in connection with the licensing or distribution of the documentary series) into "testing the waters" contributions or expenditures pursuant to 11 C.F.R. §§ 110.72, 110.82, and 101.3. Showtime and the producers would not object to the decision by a former contestant to become a candidate for public office in the future following conclusion of the *American Candidate* series – indeed, it would be viewed as a constructive development. However, they do not intend to fund, advance or defeat any individual's actual candidacy for any federal office.

Additionally, it is conceivable that in the course of speaking about their own simulated campaigns and public policy, contestants will be called upon to address policy proposals or campaigns of actual federal candidates, and particularly the incumbent President or his challengers, all of whom have become "candidates" under the FECA. As a "reality" program, contestants necessarily will be confronted with topics and questions emanating from the "real world," and hence some discussion of current federal candidates is likely to occur. Whether this spontaneous discussion occurs in the form of "express advocacy," an "electioneering communication" or pure "issue advocacy" is not predictable. What

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is certain is that any such commentary would be wholly incidental to the primary purpose and message of the documentary series.

* *

"Testing The Waters" Contributions & Expenditures

FEC regulations provide a limited exception to the contribution and expenditure reporting requirements for funds spent on a person's legitimate "testing the waters" or "exploratory" activities. Pursuant to these regulations, a person may receive or spend funds devoted "solely for the purpose of determining whether an individual should become a candidate" without such funds being considered "contributions" or "expenditures" under the FECA and without triggering reporting obligations. 11 C.F.R. §§ 100.72(a) & 100.131(a). Expenditures for activities such as polling, telephone calls and travel are permitted under this limited exception. *Id.* However, "[o]nly funds permissible under the Act may be used for such activities." *Id.*

If an individual decides to become a federal candidate or undertakes certain activities that objectively indicate such a decision, then the "testing the waters" funds are deemed to be "contributions" and "expenditures" under the FECA and the individual must back-report to the FEC all such contributions or expenditures. 11 C.F.R. § 101.3.

The FEC has opined that the decision to become a candidate "has a retroactive effect in that the financing of all activities coming within the exemption must be reported and otherwise treated as contributions and expenditures for purposes of the Act and regulations." FEC Advisory Opinion 1982-3.

It appears that in order for the FEC's "testing the waters" regulations to apply in the first instance, an individual must have a *present* intent to determine whether to mount an *actual* federal candidacy as opposed to an intent to compete in a televised simulation. *See, e.g.,* FEC Advisory Opinion 1986-6 ("testing the waters" restrictions deemed not to apply to party-building activities where "the Vice President is not a candidate for any office and [] he has publicly stated that he will not consider any such potential candidacy until after the 1986 elections").³

³ By comparison, "testing the waters" regulations apply where the potential candidate undertakes activities with the specific intent to explore a real candidacy in an actual upcoming election. *See, e.g.,* FEC Advisory Opinions 1982-3 (Alan Cranston) & 1981-32 (Reubin Askew).

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Furthermore, the Requestors are aware of no FEC precedent that would interpret the production costs or airing of a documentary television series about a simulated campaign, in which all contestants are expressly prohibited from being or becoming a candidate, or even exploring an actual candidacy during production or initial exhibition of the program, to be treated retroactively as campaign contributions and expenditures where a former contestant subsequently decides to become a federal candidate in an actual election.

"Electioneering Communications" & "Express Advocacy"

The FECA prohibits corporations from televising "electioneering communications" – communications that refer to a federal candidate – 30 days before a primary election or 60 days before a general election through broadcast or cable media. 2 U.S.C. § 441b. Corporations also are prohibited from publicly and expressly advocating the election or defeat of any clearly identified federal candidate at any time. *Id.*

As noted above, contestants might refer to actual federal candidates in the course of addressing current world events, responding to questions, or by way of comparing themselves to known public figures (e.g., "I agree with Howard Dean's position" or "My leadership style is like President Bush's"). Requestors are not aware of any precedent applying the corporate prohibitions of § 441b to enjoin a legitimate documentary series or entertainment program televised by a *bona fide* media company. Judging from dozens of televised references to federal candidates over the last three decades, ranging from explicit debates over President Nixon and the campaign of George McGovern between Archie Bunker and son-in-law Mike Stivic ("Meathead") in the politically-charged *All In The Family*, to the humorous opening monologues of Johnny Carson and Jay Leno on NBC's *The Tonight Show*, to presidential candidate Howard Dean's recent appearance on the new HBO series *K Street*, the FECA does not appear to apply to such programs.

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"Media Exemption" For "Commentary"

In any event, *American Candidate* qualifies as "commentary" and is therefore exempted from FEC regulation pursuant to the "media exemption."

The media exemption applicable to "electioneering communications" is as follows:

The term 'electioneering communication' does not include a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate.

2 U.S.C. § 434(f)(3)(B)(i).

The FEC's corresponding regulation provides:

Electioneering communication does not include any communication that appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate.

11 C.F.R. § 100.33(c)(2).

The media exemption applicable to contributions and expenditures for "testing the waters" and "express advocacy" is almost identical:

The term "expenditure" does not include any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.

2 U.S.C. § 431(9)(B)(i).

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The FEC has issued corresponding regulations that make clear that cable television receives the same protection as broadcast television:

Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication is not a contribution unless the facility is owned or controlled by any political party, political committee, or candidate

11 C.F.R. §§ 100.73 (exemption from "contribution") & 100.132 (exemption from "expenditure").

Federal courts that have addressed the "media exemption" have adopted a two-step analysis in the case of media organizations not controlled by political parties or candidates. See *FEC v. Phillips Publishing*, 517 F.Supp. 1308, 1312 (D.D.C. 1981); *Readers Digest Assoc. v. FEC*, 509 F.Supp. 1210, 1214 (S.D.N.Y. 1981). The initial inquiry is whether the entity is a *bona fide* press or media organization. If so, the second inquiry is whether the political communication is disseminated or distributed within the media organization's ordinary course of media activity or press function (including solicitations to advertise and sell its publications). *Phillips Publishing*, 517 F.Supp. at 1313. Showtime's *American Candidate* series would appear to meet both of these tests.

First, both Viacom and Showtime are well-established media companies. Viacom owns several *bona fide* media, news and publishing outlets, including Showtime which operates the Showtime television network, a premium television network with a proven track record of producing and exhibiting award-winning documentaries and docu-dramas about important political, historical and cultural issues and topics. And Mr. Cutler, the producer and director, has received critical acclaim for his previous documentaries on cultural and political topics.

Second, the production, promotion, exhibition and distribution of *American Candidate* falls squarely within Showtime's customary programming by comparison to the many documentaries and docu-dramas outlined above.

The only remaining issue that does not appear to have been answered in previous FEC opinions is whether the FEC considers a documentary series such as *American*

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Candidate as social or political "commentary" on the American political system. If so, then Showtime's *American Candidate* would qualify for the "media exemption" and other FECA prohibitions are therefore inapplicable.

In the past, the FEC has interpreted "commentary" quite broadly. It includes, for example, the provision of free and unfettered airtime to actual candidates and political parties to expressly advocate their candidates. The FEC has applied the "commentary" exemption to cable, satellite and broadcast television stations donating free television time to federal candidates and the national political parties to expressly advocate their candidacies and solicit financial contributions unfiltered by journalists. See FEC Advisory Opinions 1998-17 (Daniels Cablevision) & 1982-44 (Turner Broadcasting and WTBS). The FEC has applied the exemption to a newspaper that provided free space to federal candidates to promote their candidacies. See FEC Matter Under Review 486. And the FEC has afforded the exemption to a webcaster's gavel-to-gavel coverage of the national party conventions, see FEC Advisory Opinion 2000-13 (EXBTV and iNEXTV), as well as to a webcaster's "electronic town hall" linking presidential candidates directly to the webcaster's subscribers. See FEC Advisory Opinion 1996-16 (Bloomberg media affiliates). The FEC has applied the "commentary" or other media exemption to Garry Trudeau's "Doonesbury" cartoon (FEC MUR 3500), *The Rush Limbaugh Show* (FEC MUR 3624), CBS's *60 Minutes* (FEC MUR 3931), *Flower & Garden* magazine (FEC MUR 3660), and Northwest Airline's in-flight magazine *WorldTraveler* (FEC MUR 3607).

"Commentary" includes the explicit call to defeat a federal candidate by a publisher in solicitations to buy its newsletter. *Phillips*, 517 F. Supp. at 1313. Promotional payments by corporate advertisers to sponsor a broadcasted program also are entitled to the exemption. FEC MURs 3709 & 2567; FEC Advisory Opinion 1987-8.

As the FEC noted in Advisory Opinion 1982-44:

Although the statute and regulations do not define "commentary," the Commission is of the view that commentary cannot be limited to the broadcaster. The exemption already includes the term "editorial" which applies specifically to the broadcaster's point of view. In the opinion of the Commission, "commentary" was intended to allow third persons access to the media to discuss issues.

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The statute and regulations do not define the issues permitted to be discussed or the format in which they are to be presented under the “commentary” exemption nor do they set a time limit as to the length of the commentary.

FEC Advisory Opinion 1982-44.

Webster’s defines “commentary” as follows:

3 a : something that serves for illustration or explanation <godly persons . . . whose lives might be a fitting ~ on their teaching – W.H. Prescott> : a fact or piece of evidence that explains or illustrates a condition or characteristic <the dark, airless apartments and sunless factories . . . are a sad ~ upon our civilization – H.A. Overstreet> **b:** an observation or interpretation conveyed by suggestion, implication, analogy, or other indirect means <both books are *commentaries* with tragic or ironic overtones on certain social groups> <a scene that is a gem of satiric ~ on the world of art – Rose Feld>

Webster’s Third International Dictionary of the English Language Unabridged (1981) at 456.

The definition of “commentary” would include a “reality” documentary series such as *American Candidate*. It is an “illustration” of an American political campaign and, like the socially-conscious books referenced, it makes a statement about democratic leadership and character. Accordingly, an original documentary series depicting a simulated American political campaign and political character – though novel and entertaining – would appear to qualify as political “commentary” under the FECA. Such treatment would be consistent with the FEC’s observation that “commentary” can be manifested in a diverse range of formats, lengths, issues and editorial judgments.

First Amendment Rights

Legislative history indicates that Congress was concerned about not interfering with the media’s core First Amendment right to comment upon political matters when it adopted the FECA and this concern led it to adopt the “media exemption”:

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[I]t is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press and of association. Thus the exclusion assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.

H.R. Rep. No. 93-1239, 93d Congress, 2d Sess. at 4 (1974).

The Supreme Court has held that cable operators and programmers "engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting System, Inc. v. FEC*, 512 U.S. 622, 636 (1994). "Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'" *Leathers v. Medlock*, 499 U.S. 439, 444 (1991). Indeed, the *American Candidate* series itself enjoys First Amendment protection. See *United States v. Paramount Pictures Inc.*, 334 U.S. 131, 166 (1948) ("We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment").

Accordingly, constitutional principles support an FEC opinion that Showtime's funding and exhibition of the *American Candidate* documentary series is exempt from FECA restrictions on "testing the waters," "express advocacy" and "electioneering communications."

QUESTIONS PRESENTED

Therefore, Viacom and Showtime ask whether they and the producer TMD, as well as corporations providing products or services to the program or licensing the right to exploit the program, may fund the production, promotion and distribution of *American Candidate*, and exhibit, disseminate and in other ways distribute the documentary series as described above, in compliance with the Federal Election Campaign Act of 1971, as amended, and FEC regulations. Specifically:

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1. Will production and promotion costs of *American Candidate* by Viacom, Showtime or TMD constitute a contribution, expenditure or electioneering communication on behalf of any contestant or federal candidate?
2. Will funding of the production and promotion costs of *American Candidate* by Viacom, Showtime or TMD constitute a corporate contribution, expenditure or electioneering communication in the event that a former contestant subsequently decides to become a federal candidate?
3. Will funds expended in connection with promoting, exhibiting, webcasting or otherwise disseminating *American Candidate* via other media constitute a corporate contribution, expenditure or electioneering communication on behalf of any contestant or federal candidate?
4. Will funds expended in connection with promoting, exhibiting, webcasting or otherwise disseminating *American Candidate* via other media constitute a corporate contribution, expenditure or electioneering communication in the event that a former contestant subsequently decides to become a federal candidate?
5. Will the licensing and sub-licensing of exhibition and distribution rights in *American Candidate* to other media organizations in exchange for licensing fees constitute a corporate contribution or expenditure?
6. Will operation of the AmericanCandidate.com website or other websites connected with the *American Candidate* program constitute a corporate contribution, expenditure or electioneering communication if the website is used for purposes such as promoting *American Candidate*, tracking the series, interacting with viewers and fans, polling, hosting personalized web pages for contestants, and providing general educational information about political campaigns?
7. Does Showtime's and TMD's use of products or services provided to *American Candidate* by various corporations in return for promotional consideration or other publicity, as is customary in the industry, constitute a contribution or expenditure to any contestant or federal candidate?

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8. May Showtime and TMD require *American Candidate* contestants to solicit and raise contributions to *bona fide* 501(c)(3) charitable organizations, as well as stage and exhibit those solicitations, consistent with the FECA and FEC regulations?
9. Does Showtime's promotion, production and exhibition (and dissemination through and by other media) of *American Candidate* qualify for the "media exemption" under 2 U.S.C. §§ 431(9)(B)(i) (expenditures and contributions) & 434(f)(3)(B)(i) (electioneering communications)?

Respectfully submitted,



Jan Witold Baran



FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 24, 2003

Jan Witold Baran, Esq.
Wiley Rein & Fielding LLP
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Baran:

This refers to your letter dated October 16, 2003, concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a "reality documentary series" entitled *American Candidate*, to be funded and televised by Viacom, Inc. through its wholly-owned subsidiary, Showtime Networks Inc. ("Showtime"). Showtime has contracted with TMD Productions, Inc. ("the Producers") to provide all production services, including the services of Messrs. R.J. Cutler, Jay Roach and Tom Lassally. You state that Showtime and the Producers intend to fund, produce, market, televise, distribute and re-distribute rights to a simulated presidential campaign involving American citizens participating as themselves. These persons will compete in a series of "real-world" and staged events while being filmed over a three to four month period.

You ask whether costs associated with, and funds expended in connection with, producing, promoting, exhibiting, webcasting or otherwise distributing *American Candidate* constitute a contribution, expenditure or electioneering communication in certain circumstances. You ask whether the licensing or sub-licensing of exhibition and distribution rights in *American Candidate* would constitute a contribution or expenditure. You ask whether operation of the AmericanCandidate.com website, and other websites connected with the *American Candidate* program, constitutes a contribution, expenditure or electioneering communication. You ask whether use by Showtime and the Producers of products or services provided by various corporations in exchange for promotional consideration or publicity constitutes a contribution or expenditure. You ask whether Showtime and the Producers may require *American Candidate* contestants to solicit and raise contributions for section 501(c)(3) organizations.

The Act authorizes the Commission to issue an advisory opinion request in response to a "complete written request" from any person with respect to a specific transaction or activity

by the requesting person. 2 U.S.C. §437f(a). Commission regulations explain that such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 CFR 112.1(c). Further information will be needed for your request to include a complete description of the relevant facts. Please provide responses to the following questions:

- (1) Regarding the members of the Advisory Board, the Blue Ribbon Leadership Panel, and the professional political and media consultants/advisors (as these are referred to in your request):
 - a. What are the criteria for selecting individuals in each role? With regards to consultants/advisors, will the identity of an individual's current or past clients be a criterion in selecting an individual? If yes, please explain how this information will bear on the selection decision.
 - b. Will the Blue Ribbon Leadership Panel include current Federal candidates or officeholders? Consultants and advisers to such persons? If yes, please indicate whether they will predominantly be from one party or another.
- (2) Regarding the professional political and media consultants/advisors:
 - a. Will the consultants/advisors include consultants and advisers to current Federal candidates or officeholders? To political parties? Will party affiliation be a criterion in selecting a consultant/advisor? If yes, please explain whether the selected consultants, the Federal candidates or the officeholders will predominantly be from one party or another.
 - b. How will particular consultant/advisors be assigned to particular contestants? Will a consultant/advisor be permitted to request a particular contestant? Demand a particular contestant? Will each contestant have their own separate set of advisors from within the group of consultants/advisors?
 - c. Will a consultant/advisor be allowed to encourage contestants to promote or support or attack or oppose any particular candidate or group of candidates? To encourage the contestant to promote issues, positions or programs associated with the consultant/advisor's other political clients? To suggest to any contestant that they become a candidate for Federal office?
 - d. Will a consultant/advisor be barred from contracting with a contestant who later becomes a candidate for public office?
- (3) What, if any, "on-air" disclaimers will accompany each episode of *American Candidate* indicating that this series is a simulation and does not constitute a campaign for actual public office, and that viewers are not to contribute to, or make any disbursements on behalf of, the contestant's "campaigns," etc.? Please describe such disclaimers. Will the Websites prominently display a similar disclaimer? What will the content of that disclaimer be?
 - a. Can you provide the dates on which episodes will be aired?

- b. How will Showtime, the Producers, or others associated with *American Candidate* monitor the activities of the contestants to determine whether they have become an actual candidate or are exploring an actual candidacy?
- (4) Will Showtime, the Producers, or the contestants select the section 501(c)(3) organizations for which the contestants will fundraise in the course of the show? If the organizations are chosen by Showtime or the Producers, please explain fully the criteria to be used to select these organizations.
- (5) You ask about operation of the AmericanCandidate.com website, and about "other websites connected with the *American Candidate* program" (together referred to as the Websites). Please identify specifically the "other websites," and the persons who control them. Will Showtime or the Producers permit viewers and fans to use the Websites to expressly advocate the election or defeat of clearly identified Federal candidates? Will Showtime, the Producers or other associated with the series actively monitor and/or moderate the interaction with the viewers and fans on the Websites? Will viewers/fans be able to post comments that encourage the development of a real candidacy for any of the contestants? Will Showtime, the Producers or other associated with the series actively monitor and/or moderate the personalized web pages created for contestants? You state that the Websites will educate the public about political campaigns. How will this be done? Who, if anyone, will exercise control over the content of the Websites?
- (6) Please confirm that contestants will not be current holders of Federal, state or local elective office.

Upon receipt of your responses, this Office will give further consideration to your inquiry. If you have any questions about the advisory opinion process or this letter, please contact Albert J. Kiss at 202-694-1650.

Sincerely,



Rosemary C. Smith
Acting Associate General Counsel



Wiley Rein & Fielding LLP

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October 29, 2003

Jan Witold Baran
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Rosemary C. Smith, Esq.
Acting Associate General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Advisory Opinion Request of Viacom Inc. & Showtime
Networks Inc.

Dear Ms. Smith:

This letter responds to your letter dated October 24, 2003, seeking additional details regarding the production and exhibition of the *American Candidate* documentary series.

Viacom Inc. and Showtime Networks Inc. ("the Requestors") submitted a request for an advisory opinion on October 16, 2003 ("the Request"). In an effort to facilitate the Commission's review of this matter, the Requestors previously had submitted a draft of the request to your office. Melinda Benedek of Showtime and R.J. Cutler, the producer, attended a meeting with Commission staff on September 12 to answer questions based upon that draft. The formal Request submitted on October 16 elaborated upon the questions raised in our meeting. As discussed in both the Request as well as our meeting on September 12, not all details regarding the production and content of this "reality" documentary series can be represented definitively at this pre-production stage because many production decisions have not yet been made and because of the important need for Showtime and the producers to retain editorial and creative discretion over the production and content of this series.

The Requestors are providing responses to the additional questions posed in your letter of October 24. However, as to some questions, no definitive answer can be represented at this pre-production stage due to the limitations noted above. In those cases, the Requestors disclose that they intend to exercise full editorial and creative discretion over such matters and request that the Commission base its opinion upon that fact.

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GENERAL COUNSEL

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(1) Regarding the members of the Advisory Board, the Blue Ribbon Leadership Panel, and the professional political and media consultants/advisors (as these are referred to in your request):

(1)(a) What are the criteria for selecting individuals in each role? With regards to consultants/advisors, will the identity of any individual's current or past clients be a criterion in selecting an individual? If yes, please explain how this information will bear upon the selection decision.

Answer

The Request disclosed (at p. 5) the identity of the individuals who have agreed to serve on the Advisory Board. These individuals were invited to participate because of their extensive political experience and expertise, as well as their ability to enhance the quality of political commentary expressed in the *American Candidate* series.

As the Request explained (at p. 8), it is contemplated that the Blue Ribbon Leadership Panel will consist of "approximately a dozen leaders from the fields of government, business, education, clergy, civic and activist organizations, military and media." Beyond those criteria, Requestors intend for those individuals to be selected in the exercise of sound editorial discretion, similar to the discretion exercised by conventional news programs and political talk shows in selecting their commentators and guest experts.

Casting of professional political consultants/advisors also will be based upon the sound editorial discretion of the producers. Emphasis will be placed upon each cast member's political experience and expertise, philosophical diversity, availability and willingness to participate, the ability to enhance the quality and content of the series' political commentary, and entertainment value. As stated in the Request (at p. 7), Requestors categorically rule out an "intent . . . to advance or defeat any particular political party or candidacy in casting these commentators or political consultants," even though Requestors arguably would have a right to do so under the "media exemption" and the First Amendment.

Requestors are unable to rule out consideration of a political consultant's current or past clients as a potential criterion, and this will be vested in sound editorial discretion. The fact that a consultant has experience working for a current or past

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prominent politician might be considered in assessing the consultant's expertise or establishing his or her credentials.

(1)(b) Will the Blue Ribbon Leadership Panel include current Federal candidates or officeholders? Consultants and advisers to such persons? If yes, please indicate whether they will predominantly be from one party or another.

Answer

Although the Requestors currently have not identified any current Federal candidates, officeholders or their consultants to serve on the Blue Ribbon Leadership Panel, the Requestors cannot rule out the possibility that they might choose to do so in the exercise of their editorial discretion, and, therefore, request the Commission's guidance regarding the permissibility of doing so.

Requestors categorically can represent there will be no intent to favor or advance one political party over another, even though they arguably would have the right to do so under the "media exemption" and First Amendment.

(2) Regarding the professional political and media consultants/advisors:

(2)(a) Will the consultants/advisors include consultants and advisers to current Federal candidates or officeholders? To political parties? Will party affiliation be a criterion in selecting a consultant/advisor? If yes, please explain whether the selected consultants, the Federal candidates or the officeholders will predominantly be from one party or another.

Answer

As stated in response to question (1)(a) above, Requestors intend to cast consultants and advisers who have political experience, expertise and skill. Therefore, it is likely one or more of the consultants cast on the series will represent current Federal candidates or officeholders, and state or national political parties. As stated in the Request (at p. 7): "It is not the intent of Showtime or the producers to advance or defeat any particular political party or candidacy in casting these commentators or political consultants." Therefore, while party affiliation might be considered in an effort to insure diversity, it will not be considered as part of an effort to advance one party over another.

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(2)(b) How will particular consultant/advisors be assigned to particular contestants? Will a consultant/advisor be permitted to request a particular contestant? Demand a particular contestant? Will each contestant have their own separate set of advisors from within the group of consultants/advisors?

Answer

Requestors cannot make a definitive representation regarding how they might exercise their editorial discretion in assigning one or more consultants to a particular contestant or group of contestants and seek the Commission's guidance as to any restrictions that might apply to their ability to do so.

(2)(c) Will a consultant/advisor be allowed to encourage contestants to promote or support or attack or oppose any particular candidate or group of candidates? To encourage the contestant to promote issues, positions or programs associated with the consultant/advisor's other political clients? To suggest to any contestant that they become a candidate for Federal office?

Answer

The Requestors have made the editorial decision not to censor the contestants or consultants. However, Showtime and the producers will exercise extensive control over the content of the program that is ultimately exhibited through the editing process. As stated in the Request (at p. 7), Showtime and the producers will "exercise significant editorial discretion over the content of the program, including . . . choosing what to film, and editing thousands of hours of film to one-hour (plus or minus) weekly episodes to be presented to the public." Therefore, although consultants and contestants will be able to speak freely to one another as participants in the program, any depiction of a consultant or contestant speaking favorably or unfavorably about a Federal candidate or public policy ultimately included in an episode exhibited to the public will constitute the Requestors' own speech and commentary. Additionally, each contestant will be required to sign an agreement containing the explicit prohibition against candidacy or testing the waters, as recited in the Request (at p. 9).

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(2)(d) Will a consultant/advisor be barred from contracting with a contestant who later becomes a candidate for public office?

Answer

Requestors do not intend to "bar" a former contestant from running for political office in the future or from associating with any political consultant in the future.

(3) What, if any, "on-air" disclaimers will accompany each episode of *American Candidate* indicating that this series is a simulation and does not constitute a campaign for actual public office, and that viewers are not to contribute to, or make any disbursements on behalf of, the contestant's "campaigns," etc.? Please describe such disclaimers. Will the Websites prominently display a similar disclaimer? What will the content of that disclaimer be?

Answer

As discussed at the September 12 meeting, Requestors do not plan to display any "on air" or online disclaimers indicating that the series is a simulation or that it does not constitute a campaign for actual public office. Nor do Requestors intend to misrepresent the series as an actual campaign.

The Requestors will not be able to prevent a random viewer from making a contribution or disbursement on behalf of a contestant's simulated campaign, although, as stated in the Request (at p. 10), "each contestant will be prohibited from receiving any financial contributions to his or her *American Candidate* campaign." Should such a contribution to a contestant come to the attention of the Requestors, they will require it to be returned. Since this is a simulated campaign, the Requestors intend to impose such restrictions to maintain a fair contest.

(3)(a) Can you provide the dates on which episodes will be aired?

Answer

Precise dates for airing have not been decided. As stated in the Request (at p. 10), initial exhibition of the "television series should begin airing in the summer of 2004 and is anticipated to run through fall of 2004." Re-runs of the series will be aired thereafter. And as stated in the Request (at p. 11), "in the future Showtime may

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choose to license re-runs of the series to other media outlets in the ordinary course of business.”

(3)(b) How will Showtime, the Producers, or others associated with *American Candidate* monitor the activities of the contestants to determine whether they have become an actual candidate or are exploring an actual candidacy?

Answer

Although no formal monitoring process has been established, the Requestors will be vigilant regarding each contestant's public political activity. The producers and their staff will work closely with each contestant and anticipate that it would be difficult for any contestant to conceal plans to become an actual candidate or public statements to that effect. It also is anticipated that any such political activity would be detected by news media that would report such a discovery.

(4) Will Showtime, the Producers, or the contestant select the section 501(c)(3) organizations for which the contestants will fundraise in the course of the show? If the organizations are chosen by Showtime or the Producers, please explain fully the criteria to be used to select these organizations.

Answer

As stated in our meeting on September 12, it is contemplated that contestants would select the *bona fide* charities.

(5) You ask about operation of the AmericanCandidate.com website, and about “other websites connected with the *American Candidate* program” (together referred to as the Websites). Please identify specifically the “other websites,” and the persons who control them. Will Showtime or the Producers permit viewers and fans to use the Websites to expressly advocate the election or defeat of clearly identified Federal candidates? Will Showtime, the Producers or other associated with the series actively monitor and/or moderate the interaction with the viewers and fans on the Website? Will viewers/fans be able to post comments that encourage the development of a real candidacy for any of the contestants? Will Showtime, the Producers or other associated with the series actively monitor and/or

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moderate the personalized web pages created for contestants? You state that the Websites will educate the public about political campaigns. How will this be done? Who, if anyone, will exercise control over the content of the Websites?

Answer

Requestors currently contemplate the operation of two websites devoted specifically to the *American Candidate* series. The first website will serve as an "application website" featuring contestant application forms, entry rules, other contestant related materials, and press releases promoting the series. The second website will serve as the "series website." The series website will include, among other things, series tune-in and episode information, schedules of series events, "campaign headquarters" pages for the final contestants, educational forums, message boards and user registration templates, as explained in the Request (at p. 11). It is likely both of these websites will be accessible at the AmericanCandidate.com URL address. It is also possible that Showtime will feature and promote the *American Candidate* series on its own website, www.sho.com. Showtime will maintain ultimate editorial control over the content of all websites contemplated by the Request.

As stated in the Request (at p. 11), "It is likely that fans will be permitted to post their own reactions and opinions on the program's website. Showtime and the producers will have ultimate editorial rights over the website, although they do not intend to censor the public's speech." Accordingly, it is quite likely a fan might post express advocacy and other opinions regarding the contestants and politics on the series website, and the Requestors intend to censor very little (other than to remove, for example, defamatory or obscene materials).

It is possible that fans or other parties interested in *American Candidate* might feature the series on their own websites, and Requestors are not seeking guidance from the Commission regarding such third-party websites.

(6) Please confirm that contestants will not be current holders of Federal, state or local elective office.

Answer

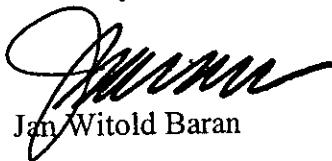
Contestants will not be current holders of Federal, state or local elective office.

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* * *

We respectfully renew our request for an advisory opinion within 60 days as required by 2 U.S.C. § 437f. As we explained in our meeting of September 12, time is of the essence because Requestors are awaiting guidance from the Commission before commencing full production of the *American Candidate* series.

Sincerely,



Jan Witold Baran

cc: The Honorable Ellen Weintraub
The Honorable Danny Lee McDonald
The Honorable Scott E. Thomas
The Honorable David M. Mason
The Honorable Michael E. Toner
The Honorable Bradley A. Smith